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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 361

WILLIAM CLAY YOUNG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William Clay Young, prays that a Writ of Certiorari issue to review an order and judgment entered by the Court of Appeals for the Sixth Circuit on May 11, 1970, which said order and judgment sustained the action of the United States District Court for the Middle District of Tennessee in denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Tennessee is not reported, but may be found as a part of the appendix to this petition. The opinion of the United States Court of Appeals for the Sixth Circuit has not as yet been reported, but it may also be found, together with its judgment on a motion to rehear, as a part of the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 11, 1970. Its judgment on a motion for rehearing was entered on June 8, 1970.

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254 (1) of the United States Code. Jurisdiction of the District Court was invoked under the provisions of Title 18, Section 3231 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C., § 1254

Courts of Appeals—Certiorari

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

U. S. Constitution

Amendment V—Criminal actions—Provisions concerning —Due process of law and just compensation clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED

(1) In a criminal action, is the mere suppression of evidence favorable to the defendant, a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, thereby constituting a sufficient ground for the granting of a new trial.

(2) Is a trial Court's and a Court of Appeals' asserted lack of due diligence on the part of a defendant's counsel sufficient ground to deprive a defendant from having a new trial, where his motion is based upon suppression of testimony on the part of the prosecution?

(3) Should a defendant be denied a new trial grounded upon suppression of testimony, although his counsel failed to obtain a subpoena for either or both of two witnesses, either of whom would have testified favorably to the defendant, when the defendant and his counsel were without knowledge of such favorable testimony until the trial, and one of the witnesses was unknown to the defendant

and his counsel until his name was disclosed during the trial, and he could not be located upon a diligent search being made during the trial and was not located until long after the trial had ended, and where the other witness reasonably appeared to be a Government witness until subsequent to the trial?

STATEMENT OF FACTS

The petitioner, William Clay Young, was indicted and convicted in the United States District Court for the Middle District of Tennessee for failure to pay a special tax as required by Sections 5691 (A), 5604 (A), and 5686 (A) of Title 26 U. S. C. The indictment contained four counts. In the first count of the indictment, petitioner was charged with carrying on the business of a retail dealer in liquors on April 14, 1965, and failing to pay the special tax required by law. In the second count he was charged with carrying on the business of a dealer in retail liquors on April 21, 1965, and failing to pay the special tax required by law. In the third count of the indictment, petitioner was charged with possessing 20 gallons of distilled spirits on April 21, 1965 without paying the tax thereon, and in count four, petitioner was charged with having in his possession a 1964 model Chevrolet Impala intended for use in the transportation of distilled spirits on April 21, 1965, without paying the tax thereon.

The trial which was held in Nashville, Tennessee commenced, before a jury, on April 2, 1969. The Government's chief witness was Robert Lee Corbin, an undercover agent with the Alcohol and Tax Division of the Internal Revenue Service. He testified that he was directed to the home of the petitioner, on April 14, 1965 by an unwitting informer by the name of "Digger" Poindexter. While at the home of the petitioner, Corbin claims that

he bought a pint of whiskey, without tax stamps affixed, in the presence of Poindexter. The Government did not make Poindexter available as a witness, nor disclose where he could be located except that he lived in or near Carthage, Tennessee. This was the first time petitioner or his counsel heard of "Digger" Poindexter and immediately thereafter tried to locate him by a diligent search, but was not able to do so, until long after the conclusion of the trial. Even if petitioner had obtained a subpoena for Poindexter during the trial he was unable to ascertain his address to furnish pursuant to Rule 17, Rules of Procedure, Criminal Proceedings, and the request for the subpoena would have been an idle gesture. The record is undisputed that Corbin is the only person who knew the whereabouts of Poindexter during the trial.

Corbin also stated that the petitioner made a sale on the 21st of April, but Corbin testified that no one had witnessed that particular sale.

Relative to the third and fourth counts of the indictment, Corbin testified that the petitioner on April 21, 1965 promised to haul 60 gallons of whiskey for delivery the following morning and that he had paid the petitioner in advance. Later that evening Corbin, along with other government agents spotted the petitioner's car, and seized 20 gallons of whiskey from the trunk of petitioner's car.

The testimony of the petifioner at the trial was in direct conflict with the government. Petitioner claims that Corbin came to his house with a man named Harold Key* and that they were drinking and brought their own illegal whiskey with them. While Corbin and Key were there, Corbin tried to get petitioner to go back into the whiskey

* The same Harold Key which the record discloses that Corbin had used as the unwitting informer in the related whiskey cases and had been subpoenaed as such by the Government in seven or eight cases.

business and offered to furnish the petitioner materials for the production of whiskey. However, petitioner refused. The next day Corbin returned once again offering to aid the petitioner in securing materials for the production of whiskey, but was refused.

Petitioner testified that at a later date Corbin returned to his home with a large amount of money. Corbin then asked the petitioner to buy some whiskey for him and told him two places where he could buy some whiskey. Since petitioner was to be in the area to obtain some tractor parts, he agreed to accommodate Corbin and bought 20 gallons of whiskey for Corbin with money furnished by Corbin, without any expectation of profit. While carrying Corbin's whiskey he was observed by Corbin and other federal agents at which time he was arrested and the whiskey was seized.

Willy Sirey, testified that he was in the petitioner's home on April 14, 1965, doing repair work, and witnessed Corbin and Key entering the house and remaining for approximately an hour. He also testified he had never known any person named "Digger" Poindexter.

On April 3, 1969 the jury found the petitioner guilty of each count of the indictment.

In due time, petitioner filed a motion for a new trial. Among other grounds petitioner sought a new trial because: (a) the Government suppressed material evidence in the case, (b) the petitioner and his counsel were surprised by certain false testimony by the Government witness, Corbin, and (c) the petitioner was able to find additional evidence subsequent to the trial which was newly discovered to the effect Corbin had testified falsely.

Relative to the charge that the Government suppressed evidence, petitioner and his counsel subsequent to the trial

were able to locate and obtain a statement from "Digger" Poindexter which corroborated petitioner's testimony to the effect that Poindexter was never in the company of Corbin at Petitioner's house.

Whereupon petitioner and his counsel located Harold Key who had been used as the informer by Corbin in seven or eight related cases and he admitted that he accompanied Corbin to petitioner's house, and admitted that he had heard Corbin attempt to entrap petitioner by offering petitioner supplies for making whiskey. Key also contradicted Corbin and admitted that petitioner had refused Corbin's offer to make illegal whiskey and that petitioner also refused to sell Corbin any illegal whiskey.

On the motion for a new trial petitioner obtained subpoenas for Key and Poindexter but, the Marshal failed to serve Poindexter. Upon proving the suppression of the testimony of Key and Poindexter and placing the statements of Poindexter and Key into the record the Government tacitly admitted that Poindexter had never been considered a Government witness by failing to establish that he had ever been subpoenaed by the Government either for the Grand Jury or trial; or that Poindexter had ever appeared in behalf of the Government as an informer in this case or any other case, or that Poindexter had ever been interviewed by the office of the United States Attorney or any other agency of the Government.

The District Court brushed aside the motion for a new trial, insisting that petitioner's attorney should have produced the Government's witnesses for the trial, and therefore this evidence could not be considered as newly discovered.

An appeal on this decision was taken to the United States Sixth Circuit Court of Appeals. Reasoning much along the same line, the Court of Appeals held that peti-

tioner should have subpoenaed Key and Poindexter as witnesses during the trial and refused to deal specifically with the question of suppression of evidence by holding that petitioner "failed to prove that the Government knew or had any reason to believe that Corbin's testimony was false, or that the Government had pretrial knowledge of the allegations made after trial by Poindexter and Key."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the District of Columbia, the Second Circuit, Third Circuit, Fourth Circuit, and for the Fifth Circuit, as demonstrated by the following cases: **Levin v. Katzenbach**, 363 F. 2d 287 (CA D. C. 1966); **United States v. Wilkins**, 326 F. 2d 135 (2nd Cir. 1964); **United States v. Consolidated Laundries Corporation**, 291 F. 2d 563 (2nd Cir. 1961); **Curran v. State of Delaware**, 259 F. 2d 707 (3rd Cir. 1958); **Barbee v. Warden, Maryland Penitentiary**, 331 F. 2d 842 (4th Cir. 1964); and **Jackson v. Wainwright**, 390 F. 2d 288 (5th Cir. 1968).

2. The United States Court of Appeals has decided an important question of federal law involving due process of law, which has not been determined by this Honorable Court, but which question should be so determined.

3. The decision of the United States Court of Appeals for the Sixth Circuit calls for an exercise of this Court's power of judicial supervision to enunciate the distinction between the rights of a convicted defendant seeking a new trial upon alleged "suppression of testimony in violation of due process" and a convicted defendant seeking a new trial based upon alleged "newly discovered evidence which would or could merely change the result of the verdict".

ARGUMENT

1. Decisions of the Court of Appeals for Sixth Circuit in Conflict With Decisions of Other Courts of Appeals.

The Court of Appeals for the Sixth Circuit did not attempt to defend the Government's action by holding that a suppression of evidence did not occur but sought to defend its illegal effect by asserting that, "appellant failed to prove that the testimony was false, or that the Government had pretrial knowledge of the allegations made after trial by Poindexter and Key."

Before discussing the pertinent decisions of other courts of appeals, petitioner contends that the record of this case amply demonstrates that the individuals responsible for the investigation, preparation and prosecution of this case did know of the falsity of Corbin's testimony and that they had pretrial knowledge of the statements made after the trial by Key and Poindexter, namely, individuals of the Alcohol and Tobacco Tax Division of Internal Revenue Service.

However, the record is silent as to whether or not the Assistant United States Attorney, who prosecuted this case, had express knowledge of such information prior to the trial. The Assistant United States Attorney representing the Government on the motion for a new trial chose to remain silent on the issue and did not admit nor deny any of the allegations on the subject expressed in the motion, affidavits, and statements of the petitioner. Even if the Assistant United States Attorney who tried the case did not have express knowledge of the falsity of the testimony of Corbin, or have express knowledge of the allegations of Key and Poindexter prior to the trial, the record is clear that the prosecuting attorney negligently failed to produce facts in his possession during the trial which could have been helpful to petitioner.

It cannot be disputed that Corbin knew of the whereabouts of both Key and Poindexter prior to and during the trial and also knew what their testimony would be. Both Corbin and the Assistant United States Attorney trying the case were conclusively bound to have known that Corbin had used Key as the informer in every related case (either seven or eight) prior to the trial of petitioner's case and that Key had been subpoenaed in every one of the related cases as a Government witness.

Moreover, the Court of Appeals for the Sixth Circuit in attempting to defend the Government in suppressing the testimony by asserting that petitioner failed to prove that the Government had guilty knowledge, either overlooked or ignored the well-known and established practice of the Department of Justice and other governmental agencies involved in the investigation and trial of criminal cases. Specifically, it must be assumed that Corbin related to the prosecuting attorney his version of the alleged offenses during their "pretrial preparation" at which time it would appear strange indeed if both Key and Poindexter related to the Assistant United States Attorney conflicting versions with the prosecution's governmental witness involved. Thus it would appear that Key, who had been under subpoena in either seven or eight related cases to petitioner's case as a Government witness for the purpose of establishing that he was the unwitting informer who traveled with Corbin and that he had done so on this particular case, but related that petitioner was not guilty of the offenses charged as Corbin had related to the United States Attorney; and upon questioning Poindexter, the Assistant United States Attorney would have learned that Poindexter never accompanied Corbin to petitioner's home on any occasion.

If it be assumed that the Assistant United States Attorney did not hear of Poindexter until Corbin testified, then it must conclusively appear that Corbin suppressed

the testimony, not only from the petitioner but also from the Assistant United States Attorney.

Furthermore, had the Assistant United States Attorney been frank, with a willingness to express the facts of this case in a forthright manner with the District Court at the hearing on the motion for a new trial, although he was not the attorney who tried the case, the record could have been made crystal clear as to the pretrial knowledge of the Office of the United States Attorney concerning the nondisclosure of Poindexter's testimony. Had this occurred he would have advised the District Court that the United States Attorney's file either contained a statement from Poindexter which was taken prior to the trial of the case, or that it did not contain such a statement. If the United States Attorney's file disclosed a statement of Poindexter favorable to the defense it was his duty to have produced it. On the contrary had the Assistant United States Attorney disclosed to the District Court that no such statement was taken from Poindexter, this by itself would have been an act of negligence, not only on the part of the governmental agency involved, but, on the part of the prosecuting attorney who tried the case which constituted a denial of due process. The duty of the United States Attorney concerning the witness Poindexter was also applicable as to the witness Key and the effects of his acts would have been the same.

The foregoing contentions of petitioner are supported by decisions of several circuits heretofore cited. For instance in **Levin v. Katzenbach**, *supra*, it was specifically held that a person's rights are violated if the government negligently fails to disclose evidence which might be helpful to the defendant, because "negligent nondisclosure is no less damaging than that which is the product of guile . . . .". The trial court in **Levin** made an express finding that the evidence "did not show that Government counsel deliberately suppressed any evidence." The trial court

also concluded that the petitioner for habeas corpus or a new trial, "failed to prove his allegation that trial counsel deliberately suppressed evidence." In **Levin** petitioner's attorney made no effort to obtain the testimony prior to or during the trial, and according to the dissenting opinion, petitioner's attorney before trial talked with one of the key witnesses on the 'newly discovered' point."

In the case of **United States v. Wilkins,** *supra*, the Court of Appeals for the Second Circuit held contrary to the decision of the Sixth Circuit by specifically holding that notwithstanding defense counsel having never requested the disclosure of evidence from the prosecution, the prosecution had the duty to make known exculpatory evidence and the failure so to do was a denial of due process of law.

In the case of **United States v. Consolidated Laundries Corporation,** *supra*, the Second Circuit also held "that the negligent suppression of material evidence by the Government entitles a defendant to a new trial."

It was as much the duty of Corbin to have made a disclosure of the testimony of Key and Poindexter as it was the duty of the Assistant United States Attorney. A failure of that duty constituted a denial of due process even if it were to be conceded that the trial prosecuting attorney had no knowledge of such suppression and was not negligent in not learning of such evidence being suppressed. This was decided in the case of **Curran v. State of Delaware,** *supra*, by the Third Circuit, and in the case of **Barbee v. Warden, Maryland Penitentiary,** *supra*, by the Fourth Circuit.

Furthermore, in **Barbee** the decision is contrary to the decision of the Sixth Circuit in this case concerning its assertion that petitioner and his counsel in not seeking the testimony of Key prior to the trial was sufficient to deny petitioner relief. In this respect the Court of Appeals for

the Fourth Circuit held concerning the suppressed evidence, which were certain tests that "It is no answer that Barbee's attorney failed to ask for the results of the tests. While a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial." It was also stated in the opinion of **Barbee** that the exculpatory evidence was concealed by the police "from the court, from defense counsel, and perhaps from the State's attorney. In guaging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." This holding is certainly applicable to the conduct of Corbin in this case.

In the case of **Jackson v. Wainwright**, supra, the opinion of the Fifth Circuit is in direct conflict with the decision made in petitioner's case by the Sixth Circuit.

In **Jackson** it was specifically held that it was not the duty of a defense attorney to place a witness of the prosecution on the witness stand. In that case the witness was subpoenaed by the prosecution and was available at the time of the trial. The Court held that, "a defense lawyer cannot be expected to assume that a witness subpoenaed by the State, even if not called to testify, has evidence favorable to the defense" (Opinion, 298).

Furthermore, in **Jackson** the undisclosed evidence was a witness, Mrs. Elberty, whose name and address were revealed to the defendant's attorney before the trial and by subpoena the prosecution produced her at the trial where she was available to defendant's attorney, but the State's attorney had not advised defendant's attorney that, although she could not identify the person at the scene of the crime the person she saw had a lighter complexion than the defendant and that she did not believe that the person she saw was a Negro.

The Court in **Jackson v. Wainwright** expressly held that "the nondisclosure of the evidence favorable to the defense, even where there was no showing of the prosecution's bad faith, offends the fundamental conceptions of a fair trial essential to due process."

Therefore the Court of Appeals should have held that when the Government witness Corbin testified that he had only one witness with him, namely, Poindexter to identify petitioner and who had witnessed the crime and that failed to produce such a witness, who could not be found by petitioner during the trial, and whose testimony was contrary to the testimony of the Government, was sufficient in itself to constitute a denial of due process of law.

To say that petitioner should not receive relief due to the suppression of exculpatory evidence because defendant's counsel had a legal right to subpoena a government witness, that the record failed to establish that the prosecution knew that Corbin's testimony was false or that petitioner failed to prove that the prosecutor had pretrial knowledge as to what a government witness would testify about the offense, does not and could not alter the fact that petitioner was denied due process of law. The crucial test should be that the defendant should receive a fair and impartial trial, irrespective of the bad or good faith of the prosecution, or the diligence or nondiligence of defendant's counsel.

2. **The United States Court of Appeals has decided an important question of federal law involving due process of law, which has not been determined by this Honorable Court, but which question should be so determined.**

Although this Honorable Court has been called upon to determine whether certain nondisclosures by the prosecution constituted a violation of due process, it is believed that the questions involved here have not been settled by this Court.

In the case of **Brady v. State of Maryland**, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) this Court extended the ruling of **Mooney v. Holohan**, 294 U. S. 103, 112, 79 L. Ed. 791, 794, 55 S. Ct. 340, 98 ALR 406 (1935), as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" (Opinion 10 L. Ed. 2nd 218).

In Brady the nondisclosure consisted of an extra judicial statement made by petitioner's companion, Boblit. Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extra judicial statements and several were shown to him but the statement in which Boblit had admitted the homicide was withheld by the prosecution. Petitioner, at his trial, admitted that he participated in the crime but claimed that Boblit did the actual killing.

3. The decision of the United States Court of Appeals for the Sixth Circuit calls for an exercise of this Court's power of judicial supervision to enunciate the distinction between the rights of a convicted defendant seeking a new trial upon alleged "suppression of testimony in violation of due process" and a convicted defendant seeking a new trial based upon alleged "newly discovered evidence which would or could merely change the result of the verdict."

The United States Court of Appeals for the Sixth Circuit made no distinction of petitioner's rights in seeking a new trial because the "newly discovered evidence" involved suppression from the petitioner in violation of due

process, and his rights in seeking a new trial on "newly discovered evidence" which would or could have changed the verdict without violating due process. In doing so, the Court relied upon the case of **United States v. Hoffa**, 382 F. 2d 856, 862 (6th Cir. 1967); in support of the Court's recognition of the well settled proposition that in order to be granted a new trial on newly discovered evidence subsequent to the trial, it is incumbent upon the convicted defendant to allege facts which infer due diligence.

Due process was not involved in the Hoffa case. The appeal involved a third motion for a new trial. The Court found that "Like the second one, it was based on alleged newly discovered evidence. The alleged newly discovered evidence does not relate to the guilt or innocence of Appellants. The motion was not filed until nearly eighteen months after their conviction and one month after we had affirmed." Furthermore, the third motion involved misconduct on the part of jurors and United States Marshals who were attending them during the sequestration. It is respectfully submitted that the Hoffa case has no application to this case.

The foregoing reason for the granting of the writ was particularly recognized by the United States Court of Appeals for the District of Columbia in the case of **Levin v. Katzenbach**, *supra*, in the following manner:

> "Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence. But appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not

a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'" (Opinion 291.)

It is respectfully submitted that the foregoing holding should be applied to the facts of this case and that this Honorable Court should in its exercise of its judicial supervisory power extend the principle announced in **Mooney v. Holahan**, *supra*, and **Brady v. State of Maryland**, *supra*, to the full extent suggested in the third reason stated above for the granting of the writ of certiorari.

The basic reason for such a decision was aptly stated by this Honorable Court in Brady (Opinion, 10 L. ed. 2d 218 219) as follows:

"The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'The result of guile,' to use the words of the Court of Appeals."

CONCLUSION

For the reasons stated the Petition for Certiorari should be granted and the decision of the Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted

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APPENDIX.

APPENDIX A

United States Court of Appeals
For the Sixth Circuit

No. 19943

United States of America,
Plaintiff-Appellee,

v.

William Clay Young,
Defendant-Appellant.

No. 19944

United States of America,
Plaintiff-Appellee,

v.

One 1964 Chevrolet Impala, etc.,
William Clay Young,
Claimant-Appellant.

On Appeal from the U. S. District Court for the Middle District of Tennessee.

Decided and Filed May 11, 1970.

Before: Phillips, Chief Judge, Weick and McCree, Circuit Judges.

Per Curiam. Defendant William Clay Young appeals from his conviction by a jury for carrying on the business of a retail dealer in liquor without paying federal taxes, in violation of 26 U. S. C. § 5691(a), and for possessing non-

tax-paid distilled spirits in violation of 26 U. S. C. § 5604 (a)(1). He also appeals from a verdict entered by the District Court on a libel of forfeiture against a 1964 Chevrolet allegedly used to transport the illegal whiskey.

We consider first the appeal from the criminal conviction. Appellant made a motion for a new trial, on the grounds that the Government had suppressed evidence; that appellant had been surprised by the Government's failure to call certain witnesses; and that after the trial, new evidence was found exculpating appellant. The District Court found no merit in the three grounds asserted. We agree, and affirm the judgment of conviction.

Appellant filed with his motion two statements which contradicted the testimony of the Government's chief witness, Corbin. One of the statements was signed by "Digger" Poindexter, who said that he had not accompanied Corbin at the time of one of his encounters with appellant, as Corbin had testified. In the other, a Government informer named Key stated that he had accompanied Corbin at that time, although Corbin had not mentioned him in his testimony. At the hearing on the motion, only Key was present to testify, and he contradicted some of the allegations in his statement.

Knowing subornation of false testimony by the prosecution violates a defendant's right to due process, and requires a new trial. *Napue v. Illinois*, 360 U. S. 264 (1959). And knowing suppression by the prosecution of exonerating evidence renders a conviction constitutionally infirm. *Brady v. Maryland*, 373 U. S. 83 (1963). However, at the hearing on his motion for a new trial, appellant failed to prove that the Government knew or had any reason to believe that Corbin's testimony was false, or that the Government had pretrial knowledge of the allegations made after trial by Poindexter and Key. Parenthetically, we observe that Poindexter's and Key's statements con-

cern only one of the two § 5691(a) counts, for which appellant received concurrent sentences.

Appellant also claims that he was surprised by Corbin's testimony and by the Government's failure to call Key or Poindexter as witnesses. There is no showing, however, that Key was unavailable to appellant at any time. Appellant has only himself to blame for his failure to contact Key until after the trial. It is alleged that Poindexter was not available during the trial, but appellant made no effort until after the trial to have him served with a subpoena.

On these facts, the District Judge did not abuse his discretion in refusing to grant the motion for a new trial. Appellant's attorney had ample opportunity to seek the proffered evidence before and during the trial, because the case was tried four years after the crime was committed. A motion for a new trial on the basis of newly discovered evidence is "not favored and should be granted only with great caution." *United States v. Hoffa*, 382 F. 2d 856, 862 (6th Cir. 1967). Moreover, "facts must be alleged which infer diligence on the part of the mover." *Ibid.* Here the facts show that appellant was anything but diligent. There is nothing to show that the evidence was not available to him before the jury returned its verdict.

We do not, however, agree with the District Court's disposition of the forfeiture count. Appellant had made a timely request for a jury trial on this issue, but, without explanation, the District Court did not instruct the jury thereon. We do not agree with the Government's contention that the jury's finding of fact on the criminal counts is conclusive here. It is possible that the jury could have found that the automobile used in transporting the illicit liquor was one other than that named in the libel. This finding would be a harmless variance from the criminal

indictment which would not require us to set aside the conviction, but it would require reversal of the forfeiture decree. In any event, appellant was entitled to have a jury decide the facts. *Vandevander v. United States*, 172 F. 2d 100 (5th Cir. 1949). Accordingly, the forfeiture judgment, based on the trial judge's findings of fact, is reversed.

The judgment of the District Court is affirmed in part and reversed in part, and the case is remanded for proceedings not inconsistent with this opinion.

APPENDIX B

United States of America
v.
William Clay Young
} No. 3282 N. E. Crim.

JUDGMENT AND COMMITMENT

(Entered April 8, 1969.)

On this 3rd day of April, 1969, came the attorney for the government and the defendant appeared in person and by his attorney Kenneth Harwell.

It is adjudged that the defendant upon his plea of not guilty and a finding of guilty by the jury under each count of the indictment has been convicted of the offense of violating Sections 5691 (a), 5604 (a) (1), and 5686 (a), Title 26, United States Code as charged in four counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years under each the first and second counts, eighteen (18) months under the third count, and one (1) year under the fourth count, said sentences to run concurrently with each other. The defendant shall be eligible for parole at such time as the Board of Parole may determine.

It is adjudged that execution of sentence imposed herein is suspended pending hearing of motion for new trial, and the defendant shall remain on his present bond.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WM. E. MILLER
United States District Judge

BRANDON LEWIS
Clerk

Approved for Entry:
ROBERT E. LEE
Assistant U. S. Attorney

APPENDIX C

ORDER ON JURY VERDICT

(Filed April 8, 1969)

Came again the Assistant United States Attorney and also came the defendant William Clay Young in person and by his attorney, Kenneth Harwell; also came again the jury, who on yesterday were respited until today.

After having heard all the proof in the case, the arguments of counsel, and the charge of the Court, and having retired to consider of their verdict, the jury returned into open court and reported that they found the defendant guilty under each count of the indictment.

Upon application of the defendant for an extension of time to file post-trial motions; it is hereby Ordered that the defendant is granted thirty days to file his motion in arrest of judgment and motion for new trial.

Approved for Entry:

/s/ ROBERT E. LEE
Assistant U. S. Attorney

Enter:

/s/ WM. E. MILLER
United States District Judge

(Seal)

APPENDIX D

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs.

William Clay Young,
Defendant-Appellant.

No. 19,943.

ORDER

(Filed June 8, 1970)

Before: Phillips, Chief Judge, Weick and McCree, Circuit Judges.

Defendant-Appellant's motion to file petition to rehear having come on to be heard and it appearing that the petition to rehear was lodged with the Clerk out of time but that in the interest of justice it should be filed, it is Ordered that the petition be received for filing. Upon consideration, it is Ordered that the petition to rehear be denied for the reason that no new contentions worthy of consideration have been presented.

Entered by order of the court

Carl W. Reuss
Clerk